

UNITED STATES OF AMERICA  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JENNIFER COURTNEY,

Plaintiff,

v.

RIVERVIEW SCHOOL DISTRICT NO. 407, a  
State of Washington Public School District;  
BARBARA WARBERG, individually, and as  
former Principal of Stillwater Elementary School,  
and the marital community composed of  
BARBARA and JAMES WARBERG; and  
MICHAEL PAUL SMITH,

Defendants.

Case No. C07-1515MJP

ORDER REMANDING CASE

This matter comes before the Court on Plaintiff Courtney's motion to remand and request for fees. (Dkt. No. 6.) Defendants Riverview School District ("Riverview") and Barbara Warberg oppose the motion. (Dkt. No. 9.) Having reviewed the motion and response, Plaintiff's reply (Dkt. No. 11), all documents submitted in support thereof and the record herein, the Court GRANTS Plaintiff's motion to remand but DENIES the request for attorneys' fees.

**Background**

On September 5, 2007, Plaintiff Jennifer Courtney filed suit in King County Superior Court, alleging that her former grade school teacher, Michael P. Smith, sexually harassed and molested her during her elementary years. Plaintiff alleges state claims against Mr. Smith, Riverview, and Barbara Warberg, and federal claims under 42 U.S.C. § 1983 and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, against Riverview and Ms. Warberg. (See Dkt. No. 1.) On September 27, 2007, Defendants Riverview and Warberg filed a notice of



1 join all proper defendants in a removal petition renders a removal notice procedurally defective.  
2 Emrich, 846 F.2d at 1193.

3 Plaintiff argues that Defendants' notice of removal is defective because it was not joined  
4 by Defendant Smith. But the rule that all defendants must join in a removal notice only applies to  
5 defendants properly joined and served in the action: "a party not served need not be joined [in the  
6 removal notice]; the defendants summonsed can remove by themselves." Salveson v. Western  
7 States Bankcard Ass'n, 731 F.2d 1423, 1429 (9th Cir. 1984), superceded in unrelated part by  
8 statute as stated in Ethridge v. Harbor House Rest., 861 F.2d 1389 (9th Cir. 1988); see also  
9 Emrich, 846 F.2d at 1193 n.1. Because Defendant Smith was not formally served until October 2,  
10 2007, his joinder is not necessary for the notice.

11 Plaintiff apparently believes that because she notified Defendant Smith of the suit by  
12 sending his attorney a copy of the complaint, the requirement that all defendants join in the  
13 removal notice applies. But receipt of a copy of the complaint does not trigger the 28 U.S.C. §  
14 1446(b) thirty-day window for filing a notice of removal. See Murphy Bros., Inc. v. Michetti Pipe  
15 Stringing, Inc., 526 U.S. 344, 347-48 (1999). Instead, "a named defendant's time to remove is  
16 triggered by simultaneous service of the summons and complaint, or receipt of the complaint,  
17 'through service or otherwise,' after and apart from service of the summons, but not by mere  
18 receipt of the complaint unattended by any formal service." Id. (emphasis added). Defendant  
19 Smith was not served until October 2, five days after Defendants Riverview and Warberg filed  
20 their removal notice. Therefore, Defendants' removal notice is not deficient on the grounds that  
21 all proper defendants failed to join it.<sup>2</sup> See Salveson, 731 F.2d at 1429.

22 Nevertheless, Defendants' notice is still defective. Where fewer than all the defendants join  
23 in a removal notice, the removing party has the burden of explaining affirmatively the absence of  
24 any co-defendants in the removal notice. Prize Frize, Inc. v. Matrix Inc., 167 F.3d 1261, 1266

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26 <sup>2</sup> Based on the Court's conclusion in this regard, the Court need not consider  
27 Defendants' alternative argument that Defendant Smith is a "nominal" party.

(9th Cir. 1999), superceded in unrelated part by statute as stated in Abrego Abrego v. The Dow Chemical Co., 443 F.3d 676 (9th Cir. 2006). The failure to expressly indicate why one or more of the defendants have not joined in the removal notice renders a removal notice procedurally defective. Prize Frize, 167 F.3d at 1266; Lee v. Wal-Mart, 2:06-CV-762-KJD-PAL, 2006 WL 3149366 at \*3 (D. Nev., Nov. 2, 2006). Here, Defendants Riverview and Warberg's removal notice does not explain Defendant Smith's absence from the notice. In fact, the notice's only mention of Defendant Smith is in a statement that a copy of the removal notice "is being served upon counsel for ... defendant Michael Paul Smith...." (Dkt. No. 1, Notice of Removal ¶ 2.) Because it does not expressly indicate why Michael Paul Smith had not joined in the removal notice, the notice is procedurally defective. See Prize Frize, 167 F.3d at 1266.

Defendants had a thirty day statutory period to cure their defective notice. See Fee, 2006 WL 3149366 at \*3. During those thirty days, Defendant Smith appeared in this action, but did not join in the removal notice. In addition, Defendants Riverview and Warberg did not amend their notice to explain Defendant Smith's failure to join. Thus, because the removal notice is defective and its deficiencies were not cured during the thirty-day statutory period, Defendants' notice fails to meet the requirements of 28 U.S.C. § 1446 and remand is appropriate.

Plaintiff requests an award of her costs and fees in the amount of \$1050.00 incurred for the motion for remand. When a federal court remands a case, it "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." Martin v. Franklin Capital Corp., 546 U.S. 132, 140 (2005). The Franklin Court also instructed that fees serve to deter defendants from prolonging litigation through removal:

The appropriate test for awarding fees under § 1447(c) should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are

1 satisfied.

2 Id. In this case, Plaintiff alleges claims under 42 U.S.C. § 1983 and 20 U.S.C. § 1681.

3 Therefore, the Court has original jurisdiction under 28 U.S.C. § 1331 and Plaintiff's action is  
4 generally removable under 28 U.S.C. § 1441. Defendants Riverview and Warberg timely filed  
5 their notice of removal and did not need to include Defendant Smith in their notice as he has not  
6 yet been served. Moreover, Plaintiff has not alleged or presented evidence suggesting that  
7 Defendants sought removal to prolong litigation or impose costs on Plaintiff. Therefore, even  
8 though the notice is incurably defective for failure to explain Defendant Smith's absence, the  
9 Court finds that Defendants Riverview and Warberg had an objectively reasonable basis for  
10 removal. The request for fees is denied.

11 **Conclusion**

12 Defendants' removal notice is defective because it did not expressly indicate why  
13 Defendant Smith had not joined in the removal notice. Because the removal notice does not  
14 comply with § 1446, the motion to remand is GRANTED. But Plaintiff's request for fees is  
15 DENIED.

16 Filed this 17<sup>th</sup> day of December, 2007.

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19 Marsha J. Pechman  
20 United States District Judge  
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